April 22. 79. Sat. N. H. Swayne

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Oct 1, 1878

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 241.

THE TOWN OF WEYAUWEGA, PLAINTIFF IN ERROR,

vs.

CHARLES H. AYLING.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED OCTOBER 14, 1876.

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the plaintiff in this action, which is filed in the office of the clerk of this court, at Milwaukee, in said district, and a copy of which is herewith served upon you. And you are also required to file your answer thereto in said clerk's office at Milwaukee and serve a copy thereof on the attorneys of the plaintiff, whose names are subscribed hereto, at their office, in Milwaukee, Wis., within twenty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer the complaint as aforesaid, the plaintiff will take judgment against you for the sum of five hundred and twenty-eight dollars, with interest thereon from the first day of June, in the year one thousand eight hundred and seventy-five, besides the costs of this action. The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 14th day of June, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the 99th.

[SEAL.] EDWARD KURTZ,
Clerk.

DIXON, HOOKER & PALMER,
Attorneys.

4 Served on the within-named Town of Weyauwega, by delivering to John Mack, chairman, and C. G. Towsley, clerk, each, personally, a copy of this summons & complaint, this 18th day of June, A. D. 1875.

C. S. HAMILTON,
Marshal.
By EPHRAIM GIDDINGS,
Deputy.

Fees: Service, $4.00; copies, 8.40; travel, 130 m., 7.80—$20.20.

5 *Complaint.*

U. S. circuit court, eastern district of Wisconsin.

CHARLES H. AYLING, PLAINTIFF,
against
THE TOWN OF WEYAUWEGA, DEFENDANT.

The above-named plaintiff, by Dixon, Hooker & Palmer, his attorneys, respectfully shows to this court and alleges that the said plaintiff is a resident and citizen of the State of Massachusetts, and that the defendant is a corporation duly created and existing under the laws of the State of Wisconsin, and is located in the county of Waupaca, in the eastern district of Wisconsin, and is a citizen of the said State of Wisconsin.

And the said plaintiff, for a first cause of action against said defendant, shows and alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest warrant, or coupon, annexed to a certain negotiable bond, numbered four (4), which said interest warrant or coupon is in the words and figures following, to wit:

$80.00.] [$80.00.

The Town of Weyauwega, Wisconsin, will pay to the bearer, at the National Bank of Commerce, of New York, $80.00 in currency on
6 the first day of June, 1875, being twelve months' interest on bond No. 4 for one thousand dollars.

C. M. FENELON,
Chairman.
C. A. VERKE, *Clerk.*

That afterwards, and before its maturity, the said interest-warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest-warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant on account of the same, the sum of eighty dollars, with interest on said sum from the 1st day of June, 1875, at the rate of seven per cent. per annum.

And the said plaintiff, for a further and separate cause of action, alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest-warrant or coupon, annexed to a certain negotiable bond, numbered five (5), which said interest-warrant or coupon is in the words and figures following, to wit:

$80.00.] [$80.00

The Town of Weyauwega, Wisconsin, will pay the bearer, at the National Bank of Commerce, New York, $80.00 in currency on the first day of June, 1875, being twelve months' interest on bond No. 5 for one thousand dollars.

C. M. FENELON,
Chairman.
C. A. VERKE, *Clerk.*

7 7. That afterwards and before its maturity the said interest-warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant on account of the same the sum of eighty dollars, with interest on said sum from the 1st day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action that said plaintiff alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest-warrant or coupon, annexed to a certain negotiable bond numbered six (6), which said interest-warrant or coupon is in the words and figures following, to wit:

$80.00.] [$80.00.

The town of Weyauwega, Wisconsin, will pay the bearer, at the National Bank of Commerce, New York, $80.00 in currency on the first day of June, 1875, being twelve months' interest on bond No. 6 for one thousand dollars.

C. M. FENELON, *Chairman.*
C. A. VERKE, *Clerk.*

That afterwards and before its maturity the said interest-warrant or coupon was, for a valuable consideration, duly transferred and
8 delivered to him, the said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest-warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of eighty dollars, with interest on said sum from the 1st day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action the said plaintiff alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest-warrant or coupon, annexed to a certain negotiable bond numbered seven (7), which said interest-warrant or coupon is in the words and figures following, to wit:

$80.00.] [$80.00.

The town of Weyauwega, Wisconsin, will pay the bearer, at the National Bank of Commerce, New York, $80.00 in currency on the first day of June, 1875, being twelve months interest on bond No. 7 for one thousand dollars.

C. M. FENELON, *Chairman*,
C. A. VERKE, *Clerk*.

That afterwards and before its maturity the said interest-warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he
9 is now the lawful owner and holder of the same; that the said interest-warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of eighty dollars, with interest thereon from the 1st day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action the said plaintiff alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest-warrant or coupon, annexed to a certain negotiable bond numbered eight (8), which said interest-warrant or coupon is in the words and figures following, to wit:

[$80 00. [$80.00.

The town of Weyauwega, Wisconsin, will pay the bearer, at the National Bank of Commerce, New York, $80.00 in currency on the first day of June, 1875, being twelve months' interest on bond No. 8 for one thousand dollars.

C. M. FENELON, *Chairman*.
C. A. VERKE, *Clerk*.

That afterwards and before its maturity the said interest-warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest-warrant or coupon has not been paid, nor any part thereof, and
10 that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of eighty dollars, with interest thereon from the 1st day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action the said plaintiff alleges that heretofore it, said defendant, for value received, duly made and issued its certain negotiable interest-warrant or coupon, annexed to a certain negotiable bond numbered nineteen (19), which said interest-warrant or coupon is in the words and figures following, to wit:

$20.00.] [$20.00.

The town of Weyauwega, Wisconsin, will pay the bearer, at the National Bank of Commerce, New York, $20.00 in currency on the first day of June, 1875, being twelve months' interest on bond No. 19 for two hundred and fifty dollars.

C. M. FENELON, *Chairman.*
C. A. VERKE, *Clerk.*

That afterwards and before its maturity the said interest warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest-warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on
11 account of the same, the sum of twenty dollars, with interest thereon from the 1st day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action the said plaintiff alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest-warrant or coupon, annexed to a certain negotiable bond numbered twenty (20), which said interest warrant or coupon is in the words and figures following, to wit:

$20.00.] [$20.00.

The town of Weyauwega, Wisconsin, will pay the bearer, at the National Bank of Commerce, New York, $20.00 in curreney on the first day of June, 1875, being twelve months' interest on bond No. twenty (20) for two hundred and fifty dollars.

C. M. FENELON, *Chairman.*
C. A. VERKE, *Clerk.*

That afterwards and before its maturity the said interest-warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that said interest-warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of twenty dollars, with interest thereon from the first day of June, 1875, at the rate of seven per cent. per annum.

12 And for a further and separate cause of action the said plaintiff alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest-warrant or coupon, annexed to a certain negotiable bond numbered twenty-one (21), which said interest-warrant or coupon is in the words and figures following, to wit:

$20.00.] [$20.00.

The town of Weyauwega, Wisconsin, will pay the bearer, at the National Bank of Commerce, New York, $20.00 in currency on the first

day of June, 1875, being twelve months' interest on bond No. 21 for two hundred and fifty dollars.

C. M. FENELON, *Chairman.*
C. A. VERKE, *Clerk.*

That afterwards and before its maturity the said interest-warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest-warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of twenty dollars, with interest thereon from 1st day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action the said plaint-
13 iff alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest-warrant or coupon, annexed to a certain negotiable bond numbered twenty-two (22), which said interest-warrant or coupon is in the words and figures following, to wit:

$20.00.] [$20.00.

The town of Weyauwega, Wisconsin, will pay the bearer at the National Bank of Commerce, New York, $20.00 in currency on the first day of June, 1875, being twelve months' interest on bond No. 22 for two hundred and fifty dollars.

C. M. FENELON, *Chairman.*
C. A. VERKE, *Clerk.*

That afterwards, and before its maturity, the said interest warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of twenty dollars and interest thereon from the 1st day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action, the said plaintiff alleges that heretofore, for value received, it, said defendant, duly made
14 and issued its certain negotiable interest warrant or coupon, annexed to a certain negotiable bond, numbered twenty-three (23), which said interest-warrant or coupon is in words and figures following, to wit:

$20.00.] [$20.00.

The town of Weyauwega, Wisconsin, will pay the bearer at the National Bank of Commerce, New York, $20.00 in currency on the first day of June, 1875, being twelve months' interest on bond No. 23 for two hundred and fifty dollars.

C. M. FENELON, *Chairman.*
C. A. VERKE, *Clerk.*

That afterwards, and before its maturity, the said interest warrant or coupon was for a valuable consideration duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest

warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of twenty (20) dollars, with interest thereon from the first day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action the said plaintiff alleges, that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest warrant or coupon annexed
15 to a certain negotiable bond, numbered twenty-four (24), which said interest warrant or coupon is in the words and figures following, to wit:

$20.00.] [$20.00

The town of Weyauwega, Wisconsin, will pay the bearer at the National Bank of Commerce, New York, $20.00 in currency on the first day of June, 1875, being twelve months' interest on bond No. 24 for two hundred and fifty dollars.

C. M. FENELON, *Chairman.*
C. A. VERKE, *Clerk.*

That afterwards, and before its maturity, the said interest warrant or coupon was, for a valuable consideration, duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of twenty dollars, with interest thereon from the first day of June, 1875, at the rate of seven per cent. per annum.

And for a further and separate cause of action the said plaintiff alleges that heretofore, for value received, it, said defendant, duly made and issued its certain negotiable interest warrant or coupon, annexed to a certain negotiable bond, numbered one hundred and twenty-five (125),
16 which said interest warrant or coupon is in the words and figures following, to wit:

$8.00.] [$8.00.

The town of Weyauwega, Wisconsin, will pay the bearer at the National Bank of Commerce, New York, $8.00 in currency on the first day of June, 1875, being twelve months' interest on bond No. 125 for one hundred dollars.

C. M. FENELON, *Chairman.*
C. A. VERKE, *Clerk.*

That afterwards, and before the maturity, the said interest warrant or coupon was for a valuable consideration duly transferred and delivered to him, said plaintiff, by the owner and holder thereof, and that he is now the lawful owner and holder of the same; that the said interest warrant or coupon has not been paid, nor any part thereof, and that there is now justly due to said plaintiff from said defendant, on account of the same, the sum of eight dollars, with interest thereon from the 1st day of June, 1875, at the rate of seven per cent. per annum.

Wherefore the plaintiff demands judgment against the defendant for the sum of five hundred and twenty-eight dollars, with interest thereon from the 1st day of June, 1875, at the rate of seven per cent. per annum.

DIXON, HOOKER & PALMER,
Pl'ff's Att'ys.

17 STATE OF WISCONSIN,
Milwaukee County, ss:

L. S. Dixon, being duly sworn, says that he is one of the attorneys for the plaintiff in this action, and makes this verification on his behalf; that the matters stated in the foregoing complaint are, as this affiant is informed and believes, true. Deponent further says that the reason why this verification is not made by said plaintiff, is that he does not reside within the county of Milwaukee, which is the county where deponent resides, and that th eaction is founded upon written instruments for the payment of money only, to wit, interest warrants or coupons, and such instruments are in the possession of this deponent, and that the information and belief upon which he makes this verification, are derived from said interest warrant or coupons.

L. S. DIXON.

Subscribed and sworn to before me this 14th day of June, 1875.
GEO. H. NOYES,
Notary Public, Mil. Co., Wis.

JULY 2, 1875.

This day came the defendant by its attorneys, Mess'rs Finches, Lynder & Miller, and filed its demurrer, as follows:

18 *Demurrer to complaint.*

Circuit court of the United States, eastern district of Wisconsin.

CHARLES H. AYLING, PLAINTIFF,
vs.
THE TOWN OF WEYAUWEGA, DEFENDANT.

Said defendant, by Finches, Lynde & Miller, its attorneys, demurs to the complaint of the said plaintiff, and for cause of demurrer alleges that said complaint does not state facts sufficient to constitute a cause of action.

FINCHES, LYNDE & MILLER,
Def'ts Att'ys.

Order overruling demurrer.

JULY 14, 1875.

This day the demurrer of the defendant to the complaint herein came on to be heard, and was argued by M'r Lynde on behalf of the defendant, and by M'r L. S. Dixon, for the plaintiff. On consideration whereof, it is ordered by the court that said demurrer be and hereby is overruled, and that the defendant have thirty days to answer said complaint.

AUGUST 31, 1875.

This day came the defendant, by its attorneys, and filed its answer, as follows:

19 *Answer.*

U. S. circuit court, eastern district, Wisconsin.

CHARLES H. AYLING, PLAINTIFF,
against
THE TOWN OF WEYAUWEGA, DEFENDANT.

Said defendant, by Finches, Lynde & Miller, its attorneys, answers

the complaint in this cause, and says that it denies that the said defendant duly made and issued any of the negotiable interest-warrants or coupons, copies of which are set out in said complaint, or any of them, or annexed them or any of them to or on certain negotiable bonds or any of them, duly issued by said defendant.

Said defendant says that it has no knowledge or information sufficient to form a belief as to whether the said interest-warrants or coupons, or any or either of them, copies of which are set out in the said complaint, were for a valuable consideration, or any consideration, transferred and delivered to said plaintiff, or as to whether said plaintiff is now the lawful owner and holder of the said coupons, or any or either of them.

Said defendant denies that there is now justly due to said plaintiff
20 from said defendant, on account of said interest-warrants or coupons, the sum of five hundred and twenty-eight dollars, with interest thereon from the first day of June, 1875, at the rate of seven per cent. per annum.

And said defendant, for a further and separate defense, alleges that the said bonds to which said interest-warrants or coupons are or were annexed upon their face purport to be dated on the first day of June, 1871, but said defendant alleges that said bonds and said interest-warrants and coupons were not in fact signed until the thirteenth day of July, 1871; that on that day the said C. A. Verke, whose name purports to be signed to the copies of said interest-warrants and coupons, set out in said complaint, was not the clerk of said town, and had not been clerk of said town from and after the 17th day of June, 1871, and had no authority to sign said bonds or coupons as town clerk of said town. And said defendant alleges that on the day the said bonds and coupons were in fact signed one Francis W. Sackett was the only qualified clerk of the said town. And said defendant alleges that said bonds and coupons, and all of them, were not signed by said C. A. Verke in said town of Weyauwega, but were signed by him in the town of Peshtigo,
21 and after he had left the town of Weyauwega and taken up his residence in the town of Peshtigo.

Wherefore said defendant demands judgment that said complaint be dismissed with costs.

FINCHES, LYNDE & MILLER,
Def'ts' Att'ys.

EASTERN DISTRICT OF WISCONSIN, *ss:*

John Mack, being duly sworn, deposes and says that he is the chairman of the board of supervisors of the town of Weyauwega, the defendant in this suit, and makes this affidavit on its behalf; that he has heard read the foregoing answer and knows its contents, and that the same is true of his own knowledge, except as to those matters alleged on information and belief, and as to those matters he believes it to be true. And deponent further says, that on the day the said bonds and coupons were in fact signed by said C. A. Verke, clerk, and up to the time the said C. A. Verke signed the interest-warrants and coupons, copies of which are set out in the complaint in this cause, the said C. A. Verke was not the town clerk of the town of Weyauwega, the defendant in this suit, but one Francis W. Sackett was the only clerk of said town of Weyauwega; and further saith not.

JOHN MACK.

Subscribed & sworn to before me this 28th day of August, A. D. 1875.
FRANCIS BLOODGOOD,
Com'r Circuit Court.

22 And now at this same term, to wit, October term, 1875, and on the eighth day thereof, to wit, on the 12th day of October, A. D. 1875, the following proceedings were had, to wit:

Trial.

CHARLES N. AYLING
vs.
THE TOWN OF WEYAUWEGA.

This day came the parties, by their counsel, M'r L. S. Dixon appearing for the plaintiff, and M'r H. M. Finch for the defendant, and the issue herein came on to be tried, whereupon a jury was called to try the same, who came, to wit, Augustus Higley, Henry T. Brown, Patrick G. Cheves, W. S. Hand, William M. Davison, Joseph B. Howard, Jacob Sherman, Samuel C. McDowell, L. D. Osgood, D. L. Bancroft, Robert Glover, and W. O. Stillman, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled. And the jurors of the jury aforesaid, being charged by the court, on their said oaths respectively do say that they find the issue herein in favor of the plaintiff, and assess the damages to the said plaintiff at the sum of five hundred and forty one dollars and sixty-eight cents.

And certificate of division of opinion of the judges, filed, as follows:

23 *Certificate of division of opinion.*

Circuit court of the United States, in and for the eastern district of Wisconsin.

CHARLES H. AYLING
vs.
THE TOWN OF WEYAUWEGA.

Be it remembered that on this 15th day of October, 1875, this case came on for trial upon the issue made in the above entitled cause, before the honorable Thomas Drummond, circuit judge, and the honorable Charles E. Dyer, district judge, and a jury was duly called, sworn, and empannelled, and on which trial it appeared as facts in this case, as follows:

First. That the defendant is a municipal corporation, created and organized under the laws of the State of Wisconsin.

Second. That under and by virtue of chapter 126 of the General Laws of the State of Wisconsin for the year 1869 the legal voters of the town of Weyauwega voted to issue negotiable bonds to the amount of forty thousand dollars, to aid in the construction of the Wisconsin Central Railroad.

Third. That on the first day of June, A. D. 1871, C. M. Fenelon was chairman of the board of supervisors of the town of Weyauwega, and C. A. Verke was the clerk of the said town of Weyauwega.

24 Fourth. That said C. A. Verke resigned his office of clerk of said town of Weyauwega on the 17th day of June, 1871; that his resignation was accepted, and on the same day one Francis W. Sackett was elected and duly qualified as the clerk of the said town of Weyauwega, and entered upon his duties as clerk of said town.

Fifth. That said C. A. Verke, after his resignation as town clerk as aforesaid, changed his residence to the town of Peshtigo, and ceased to be a resident of the town of Weyauwega.

Sixth. That on the 13th day of July, 1871, the said C. A. Verke signed the said bonds mentioned in the complaint, in the town of Peshtigo, where he then resided; that the date in the said bond at the time he so signed the same was the first day of June, 1871.

Seventh. That said C. A. Verke did not in fact sign the coupons mentioned in the complaint, or any of them, but that his signature to the coupons, as well as that of C. M. Fenelon, the chairman of said town, was lithographed from genuine signatures of said C. A. Verke and the said C. M. Fenelon.

Eighth. That at the time the said C. A. Verke signed the said bonds he was not the clerk of the town of Weyauwega, and had not been clerk thereof since the 17th day of June, 1871.

25 Ninth. That on the 13th day of July, 1871, the date the said C. A. Verke signed the said bonds, the said Francis W. Sackett was the duly and legally qualified clerk of the town of Weyauwega.

Tenth. That the said C. M. Fenelon, who signed the said bonds, was at the date he signed the same the chairman of the town of Weyauwega, and signed the same as such chairman.

Eleventh. That after the said bonds were so signed as aforesaid, the same, with the coupons annexed, were issued and delivered by the said C. M. Fenelon, chairman of the town of Weyauwega, to the Wisconsin Central Railroad Company, and came to the hands of the plaintiff by negotiation prior to their maturity, and who purchased and paid a full and valuable consideration for the same, in good faith, and without notice of any defect in said bonds or coupons, or the signatures thereto.

Twelfth. That on the trial of this cause it occurred as a question:

1st. Whether the said Town of Weyauwega was estopped from showing the true date the bonds were in fact signed by the said C. A. Verke?

2nd. Whether the said bonds, having been in fact signed by the said C. A. Verke, after he had ceased to be the clerk of the town of Weyauwega, and had removed his place of residence from said town of

26 Weyauwega, and had become a resident of the town of Peshtigo, in law were or could be valid or legal bonds of the town of Weyauwega?

3rd. Whether the fact that the said bonds bear upon their face the date of June 1st, 1871, and purport to be signed on that day by the said C. M. Fenelon, chairman, and C. A. Verke, clerk, estops or prevents the said town from showing that the said bonds were not in fact signed until July 13th, 1871, and that on that day the said C. A. Verke was not the clerk of the town of Weyauwega, and if it does not, whether in law the said bonds and coupons are invalid in the hands of a bona fide holder of the same?

And on which said questions the said judges were opposed.

And thereupon the said circuit judge charged the jury that the plaintiff was entitled to recover the amount due upon the coupons sued upon, and judgment was entered for the sum of five hundred and forty-one dollars and sixty-eight cents, the amount found to be due.

Wherefore, on motion of the defendant, by its counsel, that the points on which the disagreement hath happened may during this term be stated under the direction of the judges, and certified under the seal of this court, and made part of the record of this cause to the Su-

27 preme Court of the United States, to be finally decided, it is ordered that the foregoing facts of the case and the questions on which the disagreement of opinion hath happened, and which is made under the directions of the judges, be certified according to the request

of the defendant, by its counsel, and the law in that case made and provided.

And afterwards, to wit, on the forty-fourth day of said term, to wit, on the 26th day of November, A. D. 1875, the following proceedings were had, to wit:

Judgment.

CHARLES H. AYLING
vs.
THE TOWN OF WEYAUWEGA.

This day came the plaintiff, by his counsel, and on his motion it is considered and adjudged by this court now here, that the said plaintiff do, have, and recover of the said defendant, the Town of Weyauwega, the sum of five hundred and forty-one dollars and sixty-eight cents damages so as aforesaid assessed by the jury, together with fifty-one dollars and sixty cents, his costs about his said suit in this behalf by him expended, and that he have execution therefor.

Judgment roll filed November 26th, A. D. 1875.

EDWARD KURTZ, *Clerk.*

Damages, $541.68; costs, 51.60—$593.28.

28 DECEMBER 3, 1875.

This day came the defendant and filed its bond in the sum of two thousand dollars, with Francis W. Sackett and Charles G. Tousley as sureties, conditioned that said defendant shall prosecute a writ of error to effect, and answer all damages and costs if it fail to make its plea good; which bond is approved by the district judge and is as follows:

Bond for supersedeas.

Know all men by these presents that we, the Town of Weyauwega as principal and Francis W. Sackett and Charles G. Tousley, are held and firmly bound unto Charles H. Ayling in the full and just sum of two thousand dollars, to be paid to the said Charles H. Ayling or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Wisconsin, in a suit depending in said court between Charles H. Ayling and the Town of Weyauwega, a judgment was rendered against the said The Town of Weyauwega for
29 the sum of five hundred and forty-one dollars and sixty-eight cents: and the said The Town of Weyauwega having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles H. Ayling, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such, that if the said The Town of Weyauwega shall prosecute said writ of error to effect, and

answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

TOWN OF WEYAUWEGA,
By JOHN MOCK, [L. S.]
Chairman.
C. G. TOUSLEY, [L. S.]
Town Clerk.
F. W. SACKETT. [L. S.]

Sealed and delivered in presence of—
W. F. WATERHOUSE.
WASH. WILSON.

Approved by—

CHA'S E. DYER, *Judge.*

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

30 UNITED STATES OF AMERICA.
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America, for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete copy of the record and proceedings in the case of Charles H. Ayling vs. The Town of Weyauwega.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 19th day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 101st.

[SEAL.] EDWARD KURTZ, *Clerk.*

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States of America, for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Charles H. Ayling, plaintiff, and the Town of Weyauwega, defendant, a manifest error hath happened, to the great damage of the said Town of Weyauwega, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

of the defendant, by its counsel, and the law in that case made and provided.

And afterwards, to wit, on the forty-fourth day of said term, to wit, on the 26th day of November, A. D. 1875, the following proceedings were had, to wit:

Judgment.

CHARLES H. AYLING
vs.
THE TOWN OF WEYAUWEGA.

This day came the plaintiff, by his counsel, and on his motion it is considered and adjudged by this court now here, that the said plaintiff do, have, and recover of the said defendant, the Town of Weyauwega, the sum of five hundred and forty-one dollars and sixty-eight cents damages so as aforesaid assessed by the jury, together with fifty-one dollars and sixty cents, his costs about his said suit in this behalf by him expended, and that he have execution therefor.

Judgment roll filed November 26th, A. D. 1875.

EDWARD KURTZ, *Clerk.*

Damages, $541.68; costs, 51.60—$593.28.

28 DECEMBER 3, 1875.

This day came the defendant and filed its bond in the sum of two thousand dollars, with Francis W. Sackett and Charles G. Tousley as sureties, conditioned that said defendant shall prosecute a writ of error to effect, and answer all damages and costs if it fail to make its plea good; which bond is approved by the district judge and is as follows:

Bond for supersedeas.

Know all men by these presents that we, the Town of Weyauwega as principal and Francis W. Sackett and Charles G. Tousley, are held and firmly bound unto Charles H. Ayling in the full and just sum of two thousand dollars, to be paid to the said Charles H. Ayling or to his certain attorney, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents, sealed with our seals and dated this twenty-eighth day of November, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas lately, at a term of the circuit court of the United States in and for the eastern district of Wisconsin, in a suit depending in said court between Charles H. Ayling and the Town of Weyauwega, a judgment was rendered against the said The Town of Weyauwega for
29 the sum of five hundred and forty-one dollars and sixty-eight cents: and the said The Town of Weyauwega having obtained a writ of error, and filed a copy thereof in the clerk's office of the said court, to reverse the judgment in the aforesaid suit, and a citation directed to the said Charles H. Ayling, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, the second Monday of October next:

Now the condition of the above obligation is such, that if the said The Town of Weyauwega shall prosecute said writ of error to effect, and

answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

TOWN OF WEYAUWEGA,
By JOHN MOCK, [L. S.]
Chairman.
C. G. TOUSLEY, [L. S.]
Town Clerk.
F. W. SACKETT. [L. S.]

Sealed and delivered in presence of—
W. F. WATERHOUSE.
WASH. WILSON.

Approved by—

CHA'S E. DYER, *Judge.*

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

30 UNITED STATES OF AMERICA.
Eastern District of Wisconsin, ss:

I, Edward Kurtz, clerk of the circuit court of the United States of America, for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom now on file, and remaining of record in my office, being a full and complete copy of the record and proceedings in the case of Charles H. Ayling vs. The Town of Weyauwega.

In testimony whereof, I have hereunto set my hand, and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 19th day of September, in the year of our Lord one thousand eight hundred and seventy-six, and of the Independence of the United States the 101st.

[SEAL.] EDWARD KURTZ, *Clerk.*

31 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America, to the judges of the circuit court of the United States of America, for the eastern district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between Charles H. Ayling, plaintiff, and the Town of Weyauwega, defendant, a manifest error hath happened, to the great damage of the said Town of Weyauwega, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then under your seal distinctly and openly you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness, the honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this third day of December, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the 100th.

[SEAL.] EDWARD KURTZ,
Clerk U. S. Circuit Court for East'n Dis't of Wis.

(Indorsed:) Filed December 3, 1875. Edw. Kurtz, clerk.

32 THE UNITED STATES OF AMERICA, *ss:*

To Charles H. Ayling, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein the Town of Weyauwega is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the honorable Charles E. Dyer, district judge of the United States for said district, at the city of Milwaukee, this third day of December, in the year of our Lord one thousand eight hundred and seventy-six, and of our Independence the 100th.

[SEAL.] CHA'S E. DYER, *Judge.*

We accept service of the above citation this 19th day of September, A. D. 1876.

DIXON, HOOKER, WEGG & NOYES,
Plaintiff's Att'y.

(Endorsement on cover:) No. 241. The Town of Weyauwega, plaintiff in error, vs. Charles H. Ayling. E. Wisconsin C. C. U. S. Filed 14th October, 1876.

Supreme Court of the United States.

No. 241.—October Term, 1878.

THE TOWN OF WEYAUWEGA,

Plaintiff in Error,

vs.

CHARLES H. AYLING.

BRIEF FOR PLAINTIFF IN ERROR.

WM. P. LYNDE,

COUNSEL.

Joseph L. Pearson, Printer, 9th and D streets, Washington.

Supreme Court of the United States.

THE TOWN OF WEYAUWEGA, PLAINTIFF IN ERROR,

vs.

CHARLES H. AYLING.

This case comes before this court upon a certificate of division of opinion from the Circuit Court of the United States for the Eastern District of Wisconsin.

STATEMENT.

The certificate of division of opinion contains a concise statement of the facts, and the questions of law upon which the judges were opposed, and is as follows:

Certificate of division of opinion.

Circuit Court of the United States, in and for the Eastern District of Wisconsin.

CHARLER H. AYLING
vs.
THE TOWN OF WEYAUWEGA.

Be it remembered that on this 15th day of October, 1875, this case came on for trial upon the issue made in the above entitled cause, before the Honorable Thomas Drummond, circuit judge, and the Honorable Charles E. Dyer, district judge, and a jury was duly called, sworn, and empaneled, and on which trial it appeared as facts in this case, as follows:

First. That the defendant is a municipal corporation, created and organized under the laws of the State of Wisconsin.

Second. That under and by virtue of chapter 126 of the General Laws of the State of Wisconsin for the year 1869 the legal voters of the town of Weyauwega voted to issue negotiable bonds to the amount of forty thousand dollars, to aid in the construction of the Wisconsin Central railroad.

Third. That on the first day of June, A. D. 1871, C. M. Fenelon was chairman of the board of supervisors of the town of Weyauwega, and C. A. Verke was the clerk of the said town of Weyauwega.

Fourth. That said C. A. Verke resigned his office of clerk of said town of Weyauwega on the 17th day of June, 1871; that his resignation was accepted, and on the same day one Francis W. Sackett was elected and duly qualified as the clerk of the said town of Weyauwega, and entered upon his duties as clerk of said town.

Fifth. That said C. A. Verke, after his resignation as town clerk as aforesaid, changed his residence to the town of Peshtigo, and ceased to be a resident of the town of Weyauwega.

Sixth. That on the 13th day of July, 1871, the said C. A. Verke signed the said bonds mentioned in the complaint, in the town of Peshtigo, where he then resided; that the date in the said bond at the time he so signed the same was the first day of June, 1871.

Seventh. That said C. A. Verke did not in fact sign the coupons mentioned in the complaint, or any of them, but that his signature to the coupons, as well as that of C. M. Fenelon, the chairman of said town, was lithographed from genuine signatures of said C. A. Verke and the said C. M. Fenelon.

Eighth. That at the time the said C. A. Verke signed the said bonds he was not the clerk of the town of Weyauwega, and had not been clerk thereof since the 17th day of June, 1871.

Ninth. That on the 13th day of July, 1871, the date the said C. A. Verke signed the said bonds, the said Francis W. Sackett was the duly and legally qualified clerk of the town of Weyauwega.

Tenth. That the said C. M. Fenelon, who signed the said bonds, was at the date he signed the same the chairman of the town of Weyauwega, and signed the same as such chairman.

Eleventh. That after the said bonds were so signed as aforesaid, the same, with the coupons annexed, were issued

and delivered by the said C. M. Fenelon, chairman of the town of Weyauwega, to the Wisconsin Central Railroad Company, and came to the hands of the plaintiff by negotiation prior to their maturity, and who purchased and paid a full and valuable consideration for the same, in good faith, and without notice of any defect in said bonds or coupons, or the signatures thereto.

Twelfth. That on the trial of this cause it occurred as a question:

1st. Whether the said town of Weyauwega was estopped from showing the true date the bonds were in fact signed by the said C. A. Verke?

2nd. Whether the said bonds, having been in fact signed by the said C. A. Verke, after he had ceased to be the clerk of the town of Weyauwega, and had removed his place of residence from said town of Weyauwega, and had become a resident of the town of Peshtigo, in law were or could be valid or legal bonds of the town of Weyauwega?

3rd. Whether the fact that the said bonds bear upon their face the date of June 1st, 1871, and purport to be signed on that day by the said C. M. Fenelon, chairman, and C. A. Verke, clerk, estops or prevents the said town from showing that the said bonds were not in fact signed until July 13th, 1871, and that on that day the said C. A. Verke was not the clerk of the town of Weyauwega, and if it does not, whether in law the said bonds and coupons are invalid in the hands of a bona fide holder of the same?

And on which said questions the said judges were opposed.

And thereupon the said circuit judge charged the jury that the plaintiff was entitled to recover the amount due upon the coupons sued upon, and judgment was entered for the sum of five hundred and forty-one dollars and sixty-eight cents, the amount found to be due.

Wherefore, on motion of the defendant, by its counsel, that the points on which the disagreement hath happened may during this term be stated under the direction of the judges, and certified under the seal of this court, and made part of the record of this cause to the Supreme Court of the United States, to be finally decided, it is ordered that the foregoing facts of the case and the questions on which the disagreement of opinion hath happened, and which is made under the directions of the judges, be certified according to the request of the defendant, by its counsel, and the law in that case made and provided.

Assignment of Errors.

1st. The circuit judge erred in charging the jury that the plaintiff was entitled to recover the amount due upon the coupons sued upon.

2d. The court erred in entering judgment for the plaintiff against the defendant.

Argument.

Chapter 126 of the General Laws of the State of Wisconsin for the year 1869 authorized the proper officers of any town through which the land-grant railroad from Portage City and from Doty's Island to Lake Superior should run, to issue the bonds of the town to aid in the construction of the road, upon such terms as might be agreed upon between the railroad company and the town, after a majority of the legal voters voting upon the question shall have voted in favor of issuing the bonds. Section 5 provides, "for the purpose of giving effect to the provisions of this act, the proper officers of the town are hereby declared to be the chairman of the board of supervisors and the town clerk in each town."

The coupons sued upon and the bonds from which they were detached purport to be signed and, of course, issued by the chairman of the board of supervisors, C. M. Fenelon, and town clerk, C. A. Verke. In point of fact, C. A. Verke, at the time he signed the bonds, was not town clerk, and held no official position whatever in the town. He signed the bonds on the 13th day of July, 1871, in the town of Peshtigo, where he then resided. On the first of June preceding he was town clerk of the town of Weyauwega, and on the 17th of June he resigned that office and his resignation was accepted, and on the same day Francis W. Sackett was elected and qualified as the clerk of the said town of Weyauwega and entered upon his duties as clerk of said town. Verke changed his residence to the town of Peshtigo after his resignation, and ceased to be a resident of the town of Weyauwega.

It does not require argument to sustain the proposition that after he had resigned and his successor had been elected and qualified, he had no power to do an official act. He was no longer entrusted with the duties or subject to the obligations which rested upon him while he held the office. The sureties upon his official bond could not be held liable for any act done by him thereafter. He certainly had no authority then to sign these bonds as town clerk, or, with the chairman of the board of supervisors, to issue them on the 13th of July, about a month after he had ceased to be town clerk.

I.

The first question upon which the judges in the court below were divided in opinion, was, *Whether the said town of Weyauwega was estopped from showing the true date the bonds were in fact signed by the said C. A. Verke?*

The chairman of the board of supervisors and the town clerk were authorized by the enabling act to execute bonds which should bind the town. The chairman of the board could not do it alone, neither could the town clerk—the powers were conferred upon these two officials in their official capacity. They were constituted the agents of the town for that special purpose.

Can there be a doubt that the town has a right to show that the person who signs as town clerk was not the town clerk at the time he executed the bonds? What is the law of agency as to individuals in regard to commercial paper? Had Verke been the agent of a commercial house, authorized to sign the name of the firm to commercial paper, and thirty days after his connection with that house was dissolved, and he had moved to another place of business, and it had been published to the world that his agency had ceased—after all this he should execute a note in the name of the firm, and date it back to the time when he had authority to sign their paper, would there be a question as to the right of the firm to show when the paper was in fact

made, and that he had no authority at that time to sign the firm name?

This court has said, in the Floyd Acceptances, 7 Wall., 676: "In the case of such paper issued by an individual, when we make ourselves sure of his signature, we are sure that he is bound, because the right to make such paper belongs to all men. But the government is an abstract entity which has no hand to write or mouth to speak, could have no signature which can be recognized as in the case of an individual. It speaks and acts only through agents, or, more properly, officers These are many, and have various and diverse powers confided to them. An individual may, instead of signing with his own hand the notes and bills which he accepts, appoint an agent to do these things for him. And this appointment may be a general power to draw or accept in all cases as fully as the principal could; or it may be a limited authority to draw or accept under given circumstances defined in the instrument which confers the power. But in each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards, *for it is to be kept in mind that the protection which commercial usage throws around negotiable paper, cannot be used to establish the authority by which it was originally issued.* These principles are well established in regard to transactions of individuals. They are equally applicable to those of the government. Whenever negotiable paper is found in the market purporting to bind the government, *it must necessarily be by the signature of an officer of the government*, and the purchaser of such paper, whether the first holder or another, must, at his peril, see that the officer had authority to bind the government." Again, on page 680 of this same case, this court says, speaking of negotiable paper: "It is true, that when once made, by a person having authority to make it in any given case, it is not open

to the same inquiries, in the hands of a third party, that ordinary contracts are, as to the justice, fairness, and good faith which attended its origin, or any of its subsequent transfers; but in reference to the authority of the officers who made it to bind the government, it is to be judged by the same rule as other contracts." In Whiteside et al. vs. The United States, in the 93 U. S. R., this court say: "Different rules prevail in respect to acts and declarations of public agents from those which ordinarily govern in the case of mere private agents. Principals, in the latter category, are, in many cases, bound by the acts and declarations of their agents, even when the act or declaration was done or made without any authority, if it appear that the act was done or declaration was made by the agent in the course of his regular employment; but the government or public authority is not bound in such a case, unless it manifestly appears that the agent was acting within the scope of his authority, or that he had been held out as having authority to do the act, or was employed in his capacity as a public agent to do the act or make the declaration for the government.—(Story's Ag. (6 ed.), sec. 307th; Lee vs. Monroe, 7 Cranch, 376.)

In Mayor vs. Eschback, 17 Md., 282, the court say: "Although a private agent, acting in violation of special instructions, yet within the scope of his general authority, may bind his principal, the rule as to the effect of the like act of a public agent is otherwise, for the reason that it is better that an individual should occasionally suffer from the mistakes of public officers or agents, than to adopt a rule which, through improper combinations or collusions, might be turned to the detriment of the public." In Chisolm vs. The City of Montgomery, 2 Wood's Reports, 594, Mr. Justice Bradley says: "The plea that the city is estopped by the acts of its officers, by the resolutions of the city council, or by the negotiable form or other matter in the bonds themselves, from denying the authority of such officers to pledge the faith of the city in aid of said plank

roads, and to issue the bonds in question, cannot be maintained. Public officers cannot acquire authority by declaring they have it. They cannot shut the mouth of the people whom they represent. The officers and agents of private corporations, intrusted by them with the management of their own business and property, may estop their principals and subject them to the consequences of their unauthorized acts. But the body-politic cannot be thus silenced by the acts or declarations of its agents. If it could be, unbounded scope would be given to the peculations and frauds of public officers. I hold it to be a sound proposition that no municipal or political body can be estopped by the acts or declarations of its officers from denying their authority to bind it." From these authorities it would seem to be established conclusively that if a private individual, whose name had been put to negotiable paper by a person who once had authority to sign his name, but whose authority had been revoked, and who had dated the paper back to a time when he had authority, could show these facts in defence, a municipal corporation is not estopped from showing the true date of bonds which purport to be signed by its officer, but which in fact were signed by a person after he had ceased to be an officer, and when he had no authority to bind the town.

II.

The second question on which the judges differ in opinion is, *Whether the said bonds, having been in fact signed by the said C. A. Verke after he had ceased to be the clerk of the town of Weyauwega, and had removed his place of residence from said town of Weyauwega and had become a resident of the town of Peshtigo, in law were or could be valid or legal bonds of the town of Weyauwega?*

It would seem as if the law under which it is claimed these bonds were issued, settled this question. By it the proper officers of the town are authorized to issue the bonds, and these proper officers are declared to be the

chairman of the board of supervisors and town clerk. C. A. Verke was neither. He occupied no official position whatever. His signature could have no greater force or effect than that of any other private citizen of the state.

He certainly could not bind the town, of which he was not an officer, and not even a resident. Coler, in his work on the Law of Municipal Bonds, vol. 2, p. 136, says, "the second inquiry that the purchaser is bound to make is as to whether the bond is issued by the proper officials and is within their authority. The public official is an agent of limited powers, which are enumerated in the public acts, and all parties dealing with him are supposed to know the extent of his authority. In the matter of issuing bonds, the law that authorizes the issue frequently provides that some particular officials shall execute it. The legislature, for good and sufficient reasons, elects certain officials to act as the agents of the people in putting forth certain obligations. By its act it gives notice that those officials alone are competent to bind the people. The public are charged with this notice, and the bond, if issued by others than those selected, is, therefore, invalid wherever found. It is similar, practically, to the instrument that is made without the authority of law. It has no legal force whatever."

In this instance there was good reason for the legislature requiring the town clerk to act with the chairman of the board of supervisors in issuing the bonds. He is ex-officio clerk of all elections. Before he enters upon his office he is required to take an oath faithfully to discharge the duties of the office. He gives a bond with sureties to secure the town. He keeps the minutes of the town meetings, and is required to enter at length every order and direction, and all rules and regulations made by the meeting. He has the custody of the records, books, and papers of the town. The proposition of the railroad company to the town for aid, the vote of the town thereon, the terms and conditions of the agreement would all appear in the records and files of his office, and if the terms upon which the town had voted to issue

the bonds had not been complied with, it would be in his power, and would be his duty, to withhold the bonds until they were complied with. He was in a position to protect the town as no other officer could. It was, therefore, a wise provision that the town clerk should be one of the officials to issue the bonds of the town.

In Head vs. The Providence Insurance Company, 2 Cranch, 166, Chief Justice Marshall, in delivering the opinion of the court, says of corporations: "The act of incorporation is to them an enabling act; it gives them all the power they possess; it enables them to contract, and when it prescribes to them a mode of contracting they must observe that mode or the instrument no more creates a contract than if the body had never been incorporated."

In Frend vs. Dennett, Scott's Common Bench R., vol. 4, N. S., p. 583, the Chief Justice, Cockburn, says: "Now the power given to the board to make contracts so as to bind the rates is the creature of the act of Parliament, and that, by the very same clause which gives the board power to enter into contracts, amongst other things, expressly enacts that every such contract, whereof the value or amount shall exceed 10*l*, shall be in writing, and (in the case of a non-corporate district) sealed with the seal of the local board by whom the same is entered into, and signed by five or more members thereof, and (in the case of a corporate district) sealed with the common seal. I think the local board had no power to contract so as to bind the rates unless they did so in the manner pointed out by the statute." Willis, J., says: "But it is that section which alone confers upon the local board the power of entering into contracts; and they must exercise that power in the terms in which it is by the act conferred upon them."

Chapter 126 of the General Laws of 1869 conferred upon the proper officials of the town of Weyauwega the only power they possessed to bind the town, and prescribed the officers who should issue the bonds—bonds not issued as prescribed by the law are unauthorized and void. The law

authorizing bonds to be issued by the chairman and the town clerk does not authorize bonds to be issued by the chairman and a private citizen.

In McSpedon vs. The Mayor, &c., of New York, 7 Bos., 606, the court say: "It is a settled principle that when the legislative power, from which a corporation derives its authority to act, prescribes a particular mode in which the act shall be performed, the corporation cannot lawfully perform the act in any other manner. If not done in the manner prescribed, the act is a mere nullity, utterly void." Mr. Justice Field, in delivering the opinion of the Supreme Court of California in Zottman vs. San Francisco, 20 Cal., 103, discusses fully the power of municipal corporations and officials to bind the corporation.

"The charter was the source of all the power which could be exercised on the subject. Individual members of the common council were not invested by the charter with any power to improve the city property, and any directions given or contracts made by them upon the subject, had the same and no greater validity than like contracts made by any other resident of the city assuming to act for the corporation. And if individual members could not thus make any valid contract originally, they could not by any subsequent approval or conduct impart validity to such contract. But we go further than this: the common council even could not, by any subsequent action, give validity to a contract thus made. The mode in which alone they could bind the corporation by a contract for the improvement of the city property was prescribed by the charter, and no validity could be given by them to a contract made in any other manner. The rule is general and applies to the corporate authorities of all municipal bodies: *when the mode in which their power on any given subject can be exercised is prescribed by their charter, the mode must be followed. The mode in such cases constitutes the measure of power.* Thus, when authority is conferred to sell property, with a clause that the sale shall be made at public auction, the mode prescribed is essential

to the validity of the sale; indeed, there is no power to sell in any other way. Aside from the mode designated, there is a want of all power on the subject. This is too obvious to require argument, and so are all the authorities.—(Head vs. The Providence Insurance Company, 2 Cranch, 156; McCracken vs. The City of San Francisco, 16 Cal., 619; The Farmers' Loan and Trust Company vs. Carroll, 5 Barb., 649; The New York Fire Insurance Company vs. Ely, 5 Conn., 668. * * *)

"As a necessary consequence flowing from these views a contract not made in the prescribed mode cannot be affirmed and ratified in disregard of that mode by any subsequent action of the corporate authorities, and a liability be thereby fastened upon the corporation. Ratification is equivalent to a previous authority; it operates upon the contract in the same manner as though the authority to make the contract had existed originally. The power to ratify, therefore, necessarily supposes the power to make the contract in the first instance; and a power to ratify in a given mode supposes the power to contract in the same way."

The power of the town of Weyauwega to issue its bonds to aid in the construction of this road being derived entirely from an act of the legislature which prescribes that the bonds shall be issued by the chairman of the board of supervisors and the town clerk, the mode prescribed is essential to the validity of the bonds,—indeed there is no power to issue them in any other way,—therefore these bonds, having been in fact signed by the said C. A. Verke, after he had ceased to be the clerk of the town of Weyauwega, and had removed his place of residence from said town of Weyauwega, and had become a resident of the town of Peshtigo, are invalid and do not bind the town of Weyauwega.

III.

The third question on which the judges were opposed in opinion is, *Whether the fact that the said bonds bear upon their face the date of June* 1*st*, 1871, *and purport to be signed*

on that day by the said C. M. Fenelon, chairman, and C. A. Verke, clerk, estops or prevents the said town from showing that the said bonds were not in fact signed until July 13th, 1871, and that on that day the said C. A. Verke was not the clerk of the town of Weyauwega, and if it does not, whether in law the said bonds and coupons are invalid in the hands of a bona fide holder of the same?

In other words, is the town estopped by the recital in the bonds from showing that the bonds are not executed by authority of law, but are executed in violation of law? Can the town be estopped by the false representation of a person not an officer of the town and not authorized to represent the town?

In discussing the first question I have said about all I care to say on this. I think the authorities there cited are conclusive upon this question. In Buxendale vs. Burnett, L. R., 3 Q. B. D., 524, Judge Brommell says: "Estoppels are odious, and the doctrine should never be applied without a necessity for it. It never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done or failed to say or do." In this record there is nothing to show that the town or its officers ever knew of the execution of these bonds, except the chairman of the board of supervisors, who is one of the wrongdoers, until this suit was brought; there is nothing to show that the town received any stock or any other consideration for the bonds. It would seem that the bonds were given to the railroad company as a gratuity. What has the town done or said that should estop it from telling the truth? I am aware there is a class of cases in which it has been held that when a power is given to be exercised by certain persons upon prerequisites to be ascertained by them, and they exercise the power, a holder for value of negotiable securities issued thereunder need not go behind the authority. But in all

cases of this class there was express legislative authority to issue the bonds upon certain conditions, *and they were issued by the body authorized to do so, and with the power of determining that the conditions had been complied with.* Of this class are the following cases:

Commissioners of Knox County vs. Aspinwall, 21 How., 544.
Bissell vs. City of Jeffersonville, 24 How., 287.
Marvin vs. Commissioners of Miami County, 2 Black, 723.
Mercer County vs. Hackett, 1 Wall., 85.
Gelpcke vs. Dubuque, 1 Wall., 175.
Von Hostrop vs. Madison City, 1 Wall., 29.
Rogers vs. Burlington, 3 Wall., 654.
Supervisors vs. Schenck, 5 Wall., 783.
Lee County vs. Rogers, 7 Wall., 181.

The distinction between these cases and the case now before the court is that the bonds in suit were not "issued by the body entrusted to do so," in other words, they were not issued by the officers who were entrusted with the power to issue the bonds of the town. If we are right in these questions of law, then the circuit judge was wrong in charging the jury that the plaintiff was entitled to recover the amount due upon the coupons sued upon, and the court was wrong in entering judgment for the plaintiff, and we are entitled to have that judgment reversed.

WM. P. LYNDE,
Counsel for Plff. in Error.

Supreme Court of the United States

OCTOBER TERM, 1878.

No 241.

THE TOWN OF WEYAUWEGA,

PLAINTIFF IN ERROR,

v.

CHARLES H. AYLING,

DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

BRIEF OF EDWIN H. ABBOT FOR THE DEFENDANT IN ERROR.

BOSTON:
ALFRED MUDGE AND SON, PRINTERS,
No. 34 SCHOOL STREET.
1879.

Supreme Court of the United States.

OCTOBER TERM, 1878.

No. 241.

THE TOWN OF WEYAUWEGA,
Plaintiff in Error,

v.

CHARLES H. AYLING,
Defendant in Error.

In error to the Circuit Court of the United States for the Eastern District of Wisconsin.

BRIEF OF EDWIN H. ABBOT, FOR THE DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The defendant in error, Ayling, brought an action below upon coupons of bonds issued by the town of Weyauwega, with full statutory authority, in aid of the construction of the Wisconsin Central Railroad. He is a *bona fide* holder, for value, before maturity of the coupons, which he bought attached to the bonds and without notice of any defect in the bonds. The issue of the bonds by the town, under full statutory authority, after vote and subscription therefor, and after plenary performance by both town and railroad company of every condition requisite for their valid issue, is not questioned. This writ of error is brought upon a certificate of division of opinion between the circuit judge and the district judge, as to the effect of an irregularity

committed by the town clerk in the execution of the bonds before their delivery to the railroad company by Fenelon, who was then the chairman of the town, and the proper officer to make the delivery. That irregularity is as follows: —

The bonds are dated on, and run from, June 1, 1871; but they were not actually signed until July 13, 1871, by Verke, whose name as clerk had been previously printed in lithographic fac-simile on the coupons. Verke was in fact the clerk when the bonds and coupons were dated and printed, but resigned his office and removed from the town on June 17, 1871; and was not, when he actually *nunc pro tunc* put his sign-manual on the bonds, the clerk of the town. After he had thus signed as clerk, the town delivered the bonds regularly to the company.

It is not contended that the signature, or delivery, was in any respect fraudulently intended, or that any bad faith was practised by any one, or any loss caused to any one at any stage of the transaction by Verke's irregular act. The only question before this Court is, What effect does the law necessarily attach to this defective execution of the bond, after it has passed into the hands of an innocent purchaser for value without notice?

The statute under which these bonds were issued reads: "*Section* 4. . . . It shall be the duty of the *proper officers* in every such . . . town . . . to cause said . . . bonds so voted to be . . . issued and to be paid over or delivered to the said railroad company. . . .

"*Section* 5. For the purpose of giving effect to the provisions of this act the proper officers of every . . . town . . . mentioned in this act, are hereby declared to be . . . the chairman of the board of supervisors and the town clerk in each town."

P. & L. Laws of 1869, ch. 126. [March 12, 1869.]

It is not known to me that any statute of Wisconsin makes signature by the town clerk to a bond of the bond a condition precedent to its becoming the obligation of the town.

FIRST POINT.

THE BONDS ON THEIR FACE PURPORT TO BE BONDS OF THE TOWN ON, FROM AND AFTER JUNE 1, 1871. THIS RECITAL ESTOPS THE TOWN FROM EVERY DEFECT OF EXECUTION WHICH DOES NOT AMOUNT TO FORGERY OR DESTROY THE GENUINENESS OF THE OBLIGATION.

This is familiar law in this court.

SECOND POINT.

VERKE'S SIGNATURE AS CLERK *nunc pro tunc* WAS A PURELY MINISTERIAL ACT WHICH SPEAKS TRULY FROM AND AT THE DATE OF THE BOND. IT LACKS EVERY ESSENTIAL ELEMENT OF FORGERY. HE WAS CLERK AT DATE OF THE BONDS. THE COUPONS BORE HIS GENUINE *fac-simile*, WHICH WAS AFFIXED WHILE HE WAS CLERK, AND WHICH THE TOWN HAD ACCEPTED AS HIS SIGNATURE BEFORE HIS RESIGNATION. NO ONE ELSE COULD HAVE COMPLETED, ACCORDING TO COMMERCIAL USAGE, THE FORMAL CERTIFICATION OF THE INSTRUMENT AS THE OBLIGATION OF THE TOWN.

This also seems to be too plain for argument.

THIRD POINT.

YET EVEN IF VERKE'S SIGNING, UNDER THE CIRCUMSTANCES STATED, AMOUNTED TO FORGERY, THE DELIVERY BY THE PROPER, CHIEF EXECUTIVE OFFICER OF THE TOWN OF THESE INSTRUMENTS AS THE BONDS OF THE TOWN, WAS AN ADOPTION OF THE SIGNATURE AS GENUINE, WHICH EVER AFTERWARDS ESTOPPED THE TOWN FROM IMPEACHING IT.

1. If A forges B's name on a promissory note, and B, obtaining possession of the forged note, negotiates it to C as his own genuine note, B is estopped *in pais* to set up the forgery in defence.

Even the acceptor of a forged bill of exchange is conclusively presumed to know the drawer's signature, and cannot plead its forgery in his own defence.

Beaman *v.* Duck, 11 M. & W. 251 [1843].

Even though he may not discover the forgery until after his acceptance is made.

Levy *v.* Bank of United States, 4 Dallas, 234 [1802].
U. S. Bank *v.* Bank of Georgia, 10 Wheat. 333.

A fortiori, if the person whose signature is forged "pronounces his signature genuine, or the instrument valid, to a person who buys on his assurances, he can not afterwards set up such a defence against him or any one claiming under him. He will be estopped to deny his own concessions; for to hold otherwise, would inflict the penalty of his folly or fraud on an innocent person. It has also been held that a party may be bound by adoption of a forged instrument where he states or concedes it to be genuine to the holder."

2 Daniel on Neg. Instruments, § 1,351.
Woodruff *v.* Munroe, 33 Md. 146, 158 [1870].
Casco Bank *v.* Keene, 53 Me. 104 [1865].
Leach *v.* Buchanan, 4 Esp. 226 [1803].
Greenfield Bank *v.* Crafts, 4 Allen, 447 [1862].
Union Bank *v.* Middlebrook, 33 Conn. 95, 100 [1865].

"I cannot conceive any reason," says Mullin, P. J., "why a person whose name has been forged may not adopt and

affirm the signature as his own act, and thereby subject himself to whatever civil liability may follow from it."

Howard *v.* Duncan, 3 Lansing, 174.

Even under the English rule that a forgery cannot be ratified,

Brook *v.* Hook, L. R. 6 Ex. 89 [1871];
Williams *v.* Bayley, L. R. 1 H. L. 200, 221,

it is held that a person whose signature is forged or placed on a bill without his authority may be estopped from setting up the fact.

Brook *v.* Hook, *supra*, 100 [1839].
Wilkinson *v.* Stoney, 1 Jebb. & S. 509 [1839].
Robarts *v.* Tucker, 16 Q. B. 577 [1851].

Even on a fraudulent acceptance by a partner of a firm bill for his own private debt, after the bill has passed into possession of holder for value without notice.

Dawson *v.* Prince, 27 L. J. Ch. 169 [1858].

Because conduct may always work such an estoppel.

Arnold *v.* Cheque Bank, L. R., 1 C. P. D. 578 [1876].

And both in England and America, proof of his having issued the note as genuine in all respects would render him liable to the holder.

Meacher *v.* Fort, 3 Hill (S. C.), 227 [1837].
Hortsman *v.* Henshaw, 11 How. 177.
s. c. Redf. & Big. Lead. Cas., 62 *note*.
Price *v.* Neal, 3 Burr. 1354.